IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1977 TERM

NO. 77-1383

EDGAR WATTS, et al.,

Petitioners

v.

BAYOU LANDING, LTD., d/b/a
the Florida Book Mart

Respondents

EDGAR WATTS, JR., et al.,

Petitioners

v.

OUZA, INC., d/b/a the Palace
Book Mart, Excalibur Books,
Inc., d/b/a The Palace Book
Store

Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT EUGENE SMITH
1409 Peachtree Street, N.E.
Atlanta, Georgia 30309

Counsel for Respondents

Of Counsel:
Glen Zell, Esq.
Atlanta, Georgia

TABLE OF CASES

INDEX TO BRIEF

OPINION BELOW

The decision sought to be reviewed is contained on page 11 of the Petition for Writ of Certiorari under Appendix A.

QUESTIONS RAISED

(1) WHETHER THE GOVERNING AUTHORITY OF A MUNICIPALITY MAY, BY LEGISLATIVE ACTION TAKEN IN THE EXERCISE OF THE POLICE POWER, PROHIBIT THE CONDUCT OF A BUSINESS INVOLVED OR TO BE INVOLVED IN THE SALE OF ADMITTEDLY OBSCENE MATERIAL, THROUGH THE DENIAL OR REVOCATION OF AN OCCUPATIONAL LICENSE AND/OR OCCUPANCY PERMIT WITHOUT MEETING ADMINISTRATIVE CENSORSHIP STANDARDS AS ENUNCIATED IN FREEDMAN v. MARYLAND, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed. 2d 649 (1965);

(2) WHETHER THE OWNER OF SUCH BUSINESS IN AN EVIDENTIARY HEARING MAY AVOID DISMISSAL OF A SECTION 1983 ACTION BY REFUSING TO PRESENT ANY EVIDENCE PERTAINING TO THE ISSUE OF OBSCENITY, WITH THE

RESULT THAT THE RECORD CONTAINS NO BASIS UPON WHICH THE COURT MAY CONCLUDE THAT PRIOR RESTRAINT HAS BEEN USED.

ARGUMENTS AND CITATIONS OF AUTHORITY

A.

A MUNICIPALITY MAY NOT, BY LEGISLATIVE ACTION IN THE GUISE OF ITS POLICE POWER, PROHIBIT THE CONDUCT OF A BUSINESS INVOLVED OR TO BE INVOLVED IN THE SALE OF SEXUALLY ORIENTED MATERIAL.

Question stated by the Petitioners is incorrect, and by this very question they invited into argument the prior restraint issue. At no time did the Respondents herein admit that all of their merchandise to be offered for sale and/or exhibition was obscene as that term has been defined by this Court in Miller v. California, 413 U.S. 15 (1973).

This Court has found in the cases of Heller v. People of the State of New York, 413 U.S. 483 (1973) and Roaden v. Commonwealth of Kentucky,

406 U.S. 905 (1972) that sexual materials are presumptively protected under the Constitution until such time as they are determined to be obscene, as that term has been variously defined by this Court.

In Bayou v. City of Kenner, 335 So. 301 (1976) the Louisiana Supreme Court held that the City of Kenner was required to issue a business license so long as the applicant complied with the ordinary licensing requirements which were not patently discriminatory and not violative of the Equal Protection Clause of the Constitution of the United States. In another case, styled Mayor and Aldermen of Savannah v. TWA, 233 Ga. 885, 214 S.E.2d 370 (1975), the Georgia Supreme Court held the City could not refuse to issue a business license because of suspicion that the applicant proposed to sell materials which some might call pornographic. The reasoning in both cases was that once the applicant had complied with all of the requirements necessary for obtaining a business license to sell sexually oriented materials, the refusal to grant the appropriate license implements Due Process and Prior Restraint arguments.

In the case at bar, the City of Baton Rouge refused to issue one of the business licenses not because the applicant did not otherwise comply, but on the sole grounds of Resolution 5583 passed by the City Council of Baton Rouge, further articulated in the opinion of the Court of Appeals. The only reason set forth in the resolution besides the general and obvious dislike for this type of business, was because of the "adults only" signs in the window which offended the sensitivities of the City Council members. The evidence of the sexual materials characterized by the judge at the district court level as "filthy," "almost unbelievable," has to be beyond the pale of the First Amendment protections, the implication being that because the store may sell material today which offends the sensitivities of a sensitive part of the community recognized as being a component of the contemporary community standards, Pinkus v. United States, ____ U.S. Law Week ____ (May 23, 1978), all such press material would be equally condemned. This factor does not authorize the foreclosure of further business activity by the proprietors of the so-called adult book stores.

In essence, what we have is that the City Council is attempting to suppress presumptively protected expression because certain vocal and sensitive residents of the community disapproved of the content of the expression or were otherwise personally offended by the material sought to be exhibited by the proprietors of the store. Compare Ergoznik v. City of Jacksonville, 422 U.S. 205 (1975). This flies in the face of the rationale of this Court in Near v. Minnesota, 283 U.S. 697-738 (1931), which prohibits the disassembly of the printing press because of past misconduct by the proprietors thereof. This is in essence the classic Prior Restraint governed by the Near case and for which Freedman v. Maryland, supra, established administrative guidelines.

Although systems of prior restraint are not unconstitutional per se, e.g. Southeastern Promotions, Ltd., v. Conrad, 420 U.S. 546, 558 (1975), they are said to bear a "heavy presumption" against their Constitutional validity. Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963). As the U.S. Supreme Court stated in the

Southeastern Promotions case:

> "The presumption against prior restraints is heavier -- and the degree of protection broader -- than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable."
> 420 U.S. at 558-59.

In the case of Staub v. City of Baxley, 355 U.S. 313 (1958), the Court held that an ordinance that

> "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official -- is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."

It is abundantly clear that by whatever name Petitioners call their attempts to shutter these two adult book store enterprises, be it the police powers or personal taste of the City Council members responding to the vocal protests of sensitive members of the community, this is a [prohibited] prior restraint and for the reasons set forth herein and in the well-reasoned opinion of the Fifth Circuit, this Petition for Certiorari should be dismissed.

B.

A PROPRIETOR OF A BUSINESS INVOLVED IN THE SALE OF PRESUMPTIVELY PROTECTED SEXUALLY ORIENTED PRESS MATERIALS IS NOT REQUIRED TO ASSUME THE BURDEN TO PROVE THE NON-OBSCENITY OF THE MATERIALS CHALLENGED BY THE CITY COUNCIL AND THEIR COUNSEL.

In the case of Freedman v. Maryland, 380 U.S. 51 (1965), Blount v. Rizzi, 400 U.S. 410 (1971) and Teitel Film Corp. v. Cusak, 390 U.S. 139 (1968), it is clear that the burden to prove obscenity is on

the censor, not on the proprietor who seeks to offer for sale such presumptively protected material. As the Circuit Court opinion makes clear on page 19 of the Petition for Certiorari, par. 7:'

> "The materials examined by the District Court condemned as 'filthy', etc., were not even from the Bayou Landing Book Store, but were purchased in Jefferson Parish."

The Court went on to say that since there is a difference between pornography and obscenity, while the material from one store might be obscene, the material from the other might be protected:

> "Second, the burden of seeking a judicial determination of the protected or unprotected categorization of literature must be placed on the government and the government must allow a free trade in material presumed protected until it demonstrates in Court that the materials are obscene."

A reading of the relevant documents in this case as set forth in the opinion of the Court makes it clear that even on Due Process considerations the

argument of counsel for Petitioners in this instance is not well taken. This counsel was present in the Court at the time of the argument in the case of Stanley v. Georgia, 399 U.S. 557 (1969), and while the Court was considering the constitutional issue of private possession of erotic materials in one's own home and whether the same is fairly protected from intrusion by law enforcement officials, the Assistant Attorney General, Robert Sparks, in oral argument, continually hammered on the point that the films involved, both by their titles and their presumed content, should be examined by the Justices of the Supreme Court before ruling on the constitutional issue presented. After Mr. Sparks stated this proposition for the tenth time, Mr. Justice Harlan raised his head from the bench, looked at counsel, and commented something to the effect: "What you are saying, Sir, is that you want our constitutional judgment dimmed by the viewing of these films".

CONCLUSION

We hereby submit that what the Petitioners are attempting to do is to raise the spectre that the materials which they purchased from stores other than those of the Respondents herein are to be comparable to materials Respondents, as proprietors of their respective book stores, proposed to sell, and for this reason there should be a judgment that the same are obscene and thus the proprietors are not entitled to procedural First Amendment protections, including protection against prior restraint, they are wrong and the Petition should be dismissed.

Respectfully submitted,

ROBERT EUGENE SMITH, Esquire
1409 Peachtree Street, N. E.
Atlanta, Georgia 30309

Counsel for Respondents

Of Counsel:

GLENN ZELL, Esquire
66 Luckie Street, N. W.
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

I, ROBERT EUGENE SMITH, Counsel for Respondents, and a member of the Bar of the United States, hereby certify that on the ____ day of June, 1978, I served three copies of the Brief of Respondents in Opposition to Petition for Writ of Certiorari on Joseph F. Keogh, Esq., Attorney for Petitioners, 326 Governmental Building, Baton Rouge, Louisiana 70821, by a duly addressed envelope with postaga prepaid.

ROBERT EUGENE SMITH